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THIRD PARTY STANDING FOR PROPERTY TAX ASSESSMENTS: *TUG VALLEY RECOVERY CENTER, INC. v. MINGO CTY. COMM'N*

The West Virginia Constitution requires that ad valorem taxation rates be "uniform and equal throughout the State,"¹ both as among items of the same type of property and as among the four different classes of property.² By statute the county assessor must use the property's "true and actual value" as the basis for appraisals made for assessment purposes.³ This guarantees, at least in theory, uniform and equal treatment to taxpayers as well as uniform and equal revenues flowing to county governments to fund vital services, primarily education. Should taxpayers feel that their properties are being taxed proportionately higher than similar property owned by their neighbors they may, and have, resorted to administrative and judicial remedies to have their assessments lowered to a level equal with others.⁴

¹ W. VA. CONST. art. 10, § 1.

² *In re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959).

³ W. VA. CODE § 11-3-1 (1974 Replacement Vol.).

⁴ W. VA. CODE § 11-3-25 (1974 Replacement Vol.) provides for review of assessments, after petition to the county board of equalization and review, in a de novo hearing before the circuit court. *See also In re Assessment of Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959); *In re Pocahontas Land Corp.*, 210 S.E.2d 641 (W.Va. 1974); *In re U.S. Steel*, 268 S.E.2d 128 (W.Va. 1980). In *Kanawha Valley Bank* the petitioners contended that their shares of stock were being appraised and assessed at 100% of their cash value while other classes of property in the county were valued at a much lower percentage. Testimony of the county assessor revealed that residential lots were valued at roughly 35% of their true value. The court ordered the bank's assessment reduced to a level commensurate with that of other classes of property. In *Pocahontas Land* the court invalidated a county assessor's attempt to cover the county's budget deficit by arbitrarily raising the assessments of the county's twenty largest property holders. In the *U.S. Steel* case petitioner's property was appraised at 108% of the state tax commissioner's valuation, while similar property in the county was appraised at only 68% of the commissioner's figure. The court reversed the circuit court's order (which had reduced the appraisal to 100% of that figure), and ruled that U.S. Steel's appraised value should be no higher than that of similar properties in the county.

A recent state supreme court decision attempts to achieve taxation based on "true and actual value" by allowing county residents to compel examination of the appraisal and assessment of any property in the county, including property held by third parties. The court ruled that the residents' interests in services provided by the county conferred standing sufficient for them to maintain an action to insure that all taxpayers in the county were taxed uniformly and equally. *Tug Valley Recovery Center, Inc. v. Mingo County Commission* and *Lincoln Citizens for Tax Reform v. Abraham*,⁵ were suits by taxpayers' groups⁶ seeking to compel higher assessments of large landholders' interests in their respective counties.⁷

Mineral estates in flood-ravaged Mingo County were assessed at the time at an average value of \$18.00 an acre, while the state tax commissioner's report for that year suggested a value of \$168.00 an acre; by the time of the decision the tax commissioner's valuation had risen to \$360.00 an acre. In Lincoln County, the average assessed value of all mineral interests was only \$5.06 per acre. In Mingo County one corporation owned or held interests in 39,000 acres; in Lincoln County a few companies held large amounts of land or interests in land, including

⁵ 261 S.E.2d 165 (W.Va. 1979). The cases were consolidated for argument and decision because of their legal similarity.

⁶ Petitioner Tug Valley Recovery Center, Inc., a registered corporation with the State of West Virginia, owns property and pays taxes in its own name. *Id.* at 167. Petitioner Lincoln Citizens for Tax Reform, unincorporated and not a tax-paying property owner, was composed of some twenty members, nearly all residential taxpayers and parents of school-age children. *Id.* at 168.

⁷ *Tug Valley* could be considered the latest expression of taxpayer's unhappiness with local property tax structures as they relate to funding county services, especially in their role as the local component of educational support funding. In *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979), cited by the court in *Tug Valley*, parents of school-age Lincoln County children sought a declaratory judgment on the claim that the existing system, basing the amount of state educational aid on the amount of that county's property tax revenues, denied citizens of poorer counties the "thorough and efficient" education required in Art. 12, Section 1 of the West Virginia Constitution. *Id.* at 861. While the supreme court recognized a "thorough and efficient" education a fundamental constitutional right in the state, the case was remanded for further development of the facts. It is interesting that Justice Neely, though moved by the "woeful" condition of Lincoln County schools, chose to dissent in *Pauley*, recognizing the political nature of the issue. *Id.* at 897. *Tug Valley* was decided without a single dissent.

Columbia Gas Company, which owned 78% of all mineral interests in the county.⁸

After denial of their petitions by their county commissions, both associations sought the judicial review authorized by West Virginia Code section 11-3-25⁹ to compel county officials to revise their mineral estates valuations.¹⁰ The Mingo County Circuit Court granted a motion to dismiss the petition, expressly holding that plaintiff Tug Valley Recovery Center, Inc. lacked standing sufficient to maintain the action. The Circuit Court of Lincoln County specifically declined to rule on whether the petitioners had standing to bring the action. It did, however, order the county's assessments increased for the next tax year, postponing immediate action on the belief that the court could not set tax rates, especially when the landowner was not before the court.¹¹

Upon appeals by the citizens' groups the West Virginia Supreme Court of Appeals consolidated the cases and Justice McGraw, writing the opinion, framed the issues:

First, does an interested resident or taxpayer have standing to contest the assessment of land not belonging to him? Secondly, to what extent does a circuit court have the power to set tax rates when the responsibility and duty to do so have been neglected by the Board of Equalization and Review?¹²

These issues and the court's holding will be reviewed separately.

I. STANDING OF THIRD PARTIES

The court determined that the petitioners had standing to maintain the actions by recognizing that "if one party is

⁸ 261 S.E.2d 165, 167-68 (W. Va. 1979).

⁹ (1974 Replacement Vol.).

¹⁰ Plaintiff Tug Valley Recovery Center introduced various evidence in support of their claim of undervaluation, including the state tax commissioner's coal value appraisals, before the county board of equalization and review. At that meeting the board indicated that the petition would be granted, but ten days later apparently reconsidered and decided that reappraisal would be delayed until the following year. 261 S.E.2d at 168. The Lincoln County board similarly declined to raise their mineral estates assessments until the following year, stating that they believed there was not sufficient time to do so legally. *Id.*

¹¹ *Id.* at 168.

¹² *Id.* at 169.

underassessed, the resulting injury is to all other members of the taxing district who are discriminatorily assessed and denied the benefits of full and equitable taxation."¹³ Justice McGraw relied upon two statutes, read *in pari materia*, to grant standing to the petitioners: West Virginia Code Section 11-3-25,¹⁴ dealing with review of property assessments by circuit courts upon motion of "any person aggrieved by any assessment"; and West Virginia Code Section 18-9A-11,¹⁵ part of a comprehensive plan for support of public schools.

It is questionable, however, whether the two statutes should properly be read *in pari materia*. Although Section 18-9A-11 specifically states that it is "not to be construed to alter or repeal in any manner the provisions of chapter eleven of this Code, but shall be construed *in pari materia* therewith,"¹⁶ to be

¹³ *Id.* at 172.

¹⁴ (1974 Replacement Vol.). This section provides in part:

Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation or whose assessment has been raised by the county court above the assessment fixed by the assessor, or who contested the classification or taxability of his property may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court of the county in which such books are made out;

Id.

¹⁵ (1977 Replacement Vol.). This section provides in part:

In any year in which the total assessed valuation of a county shall fail to meet the minimum requirements above set forth, the county court of such county shall allocate for such year to the county board of education from the tax levies as will, when applied to the valuations for assessment purposes of such property in the county, provide a sum of money equal to the difference between the amount of revenue which will be produced by application of the allowable school levy rates defined in . . . [§ 18-9A-2] . . . upon the valuations for assessment purposes of such property and the amount of revenue which would be yielded by the application of such levies to fifty percent of the total of appraised valuations of such property. In the event the county court shall fail or refuse to make the reallocation of levies as provided for herein, the county board of education, the tax commissioner, the state board, or any other interested party, shall have the right to enforce the same by writ of mandamus in any court of competent jurisdiction.

Id.

¹⁶ *Id.*

so read, the court requires that two statutes "must not be in conflict and must relate to the same general subject."¹⁷

While sections 11-3-25 and 18-9A-11 arguably relate to the same general subject of taxation, the specific passages used by the court have purposes distinctly different. "Any person claiming to be aggrieved" in section 11-3-25 relates to taxpayer appeals of property assessments before circuit courts, after petitioning the county board.¹⁸ "Any other interested party" in section 18-9A-11 does not deal with review, appeal, or reappraisal of individual assessments at all.¹⁹ Thus, while sections 11-3-25 and 18-9A-11 might be said to relate to the same general subject, synthesis of the two phrases relied on by the court does not come to hand quite as readily as the opinion indicates.

In support of its "standing" holding, the *Tug Valley* court cited decisions from the United States Supreme Court and one federal circuit court,²⁰ asserting that "[v]iewed in this light, the concrete and unmistakable interest of the petitioners becomes crystal clear."²¹ However, the Supreme Court and federal circuit decisions cited by the court did not involve any direct attempt by a taxpayer to compel an increase in the valuation of a third party's property; rather the taxpayers were attempting to win a decrease in their own assessments by pointing to exempt or undervalued classes of other taxpayers. In those situations the courts declined to raise the assessments of the other taxpayers (large, populous classes as opposed to one or a few in *Tug Valley*), holding that such a remedy would be inconvenient and impractical.²²

¹⁷ 261 S.E.2d 165, 170, (1979) *citing* *State ex rel. Miller v. Locke*, 253 S.E.2d 540 (W. Va. 1979) and *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, 244 S.E.2d 321 (W. Va. 1978).

¹⁸ (1974 Replacement Vol.).

¹⁹ (1977 Replacement Vol.). Although the statute is the basic operating statute of the state tax commissioner's office, the powers attributed to that office have never been fully reviewed by the state supreme court.

²⁰ 261 S.E.2d 165, 171-73, *citing* *Liggett v. Lee*, 288 U.S. 517 (1933); *Cumberland Coal Co. v. Board*, 284 U.S. 23 (1931); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918); *Dundee Mortgage Trust Invest. Co. v. Charlton*, 32 F. 192 (C.C.D. Or. 1887).

²¹ 261 S.E.2d at 172.

²² *Id.*

While the cited cases do stand for the court's general proposition that all members of a taxing district are injured by the underassessment of one property owner, these cases rejected the remedy applied by the court in *Tug Valley*. The court in fact cited only one applicable case as authority for its grant of standing to persons other than the taxpayer whose assessment is questioned.²³

A survey of this and other case law reveals that such third-party suits have been sustained in a majority of the jurisdictions that have entertained the question; but the decisions have, as a rule, done so or refused to do so on the basis of language in assessment-review statutes only.²⁴ The court did initially observe that the "common, ordinary, and accepted meaning" of "any person aggrieved" in section 11-3-25 would include taxpayers' groups like the petitioners, but failed to acknowledge that other jurisdictions have reached the same result on the basis of similar, or even less accomodating, language alone.²⁵ Consideration of these precedents would have afforded a much-needed opportunity for the court to define the parameters of its grant of standing and the situations where it may properly be asserted.

²³ Board of County Comm'rs v. Buch, 190 Md. 394, 58 A.2d 672 (1948). The *Tug Valley* court also cursorily cited two other relevant cases under a "compare" signal but declined to analyze, discuss, or distinguish them. See 261 S.E.2d 166, 173, citing *State ex rel. Hepperla v. Glander*, 160 Ohio St. 59, 113 N.E.2d 357 (1953) and *Pierce v. Green*, 229 Iowa 22, 294 N.W. 237 (1940).

²⁴ See Board of County Commissioners v. Buch, 190 Md. 394, 58 A.2d 672 (1948); *Pierce v. Green*, 229 Iowa, 22, 294 N.W.237 (1940); *Ryan v. Douglas County Bd. of Equalization*, 199 Neb. 291, 258 N.W.2d 626 (1977). See also *Pulaski County v. Commercial Nat'l Bank*, 210 Ark. 124, 194 S.W.2d 883 (1946); *State ex rel. Hepperla v. Glander*, 160 Ohio St. 59, 113 N.E.2d 357 (1953); *Southern Ry. Co. v. Clement*, 57 Tenn. App. 54, 415 S.W.2d 146 (1966); *Appeal of Bosley*, 29 N.D. App. 468, 224 S.E.2d 686 (1976).

²⁵ See, e.g., MD. TAX & REV. CODE ANN. § 81-255 (Any taxpayer . . . may demand a hearing . . . as to the assessment of any property . . ."); IOWA CODE §§ 441.13, 441.26, 661.1, 661.9 (general provisions for writ of mandamus); NEB. REV. STAT. §§ 25-21, 154 (declaratory judgment available to "any person . . . whose rights, status, or other legal relations are affected . . ."); ARK. STAT. ANN. § 84-708 ("Any property owner may . . . apply . . . for the adjustment of the assessment of his own property or that of another person . . ."); OHIO REV. CODE ANN. § 5719.19 ("Any taxpayer may file such a complaint as to . . . his own or another's real property . . ."); TENN. CODE ANN. 67-806(3) ("Property other than property owned by the taxpayer . . ."); N.C. GEN. STAT. § 105-322(g)(2) ("his property or the property of others.").

The scope of the standing recognized by *Tug Valley* seems almost limitless. The only limitation even implied in the opinion is "every citizen, every person affected by the tax base."²⁶ Although petitioner Tug Valley Recovery Center was an incorporated association, owning property and paying taxes in its own right, Lincoln Citizens for Tax Reform was not and paid no taxes as a group. Thus, one apparently need not pay property taxes to a county to contest that county's assessment practices. The opinion in *Tug Valley* speaks of consumers of county services, not those who fund them.

Perhaps legislative or judicial action will eventually limit this grant to some extent. Absent some further restriction, it seems the only barrier between a possibly vexatious plaintiff and legal problems for the subject of his complaint is the cost of beginning the litigation, whether the claim is ultimately as meritorious as that in *Tug Valley* or not.

II. DUTY OF CIRCUIT COURTS TO ADJUST ASSESSMENTS

Having determined that petitioners had the requisite standing to maintain the action, the *Tug Valley* court returned to its second issue: "to what extent does a circuit court have the power to set tax rates when the responsibility and duty to do so have been neglected by the Board of Equalization and Review."²⁷ Justice McGraw wrote:

It is incumbent upon the circuit court, as it would be upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner.

....

[T]hat appraisal is to serve as the basis for determining true and actual value for all assessment purposes Therefore, once the Tax Commissioner's appraisal has been made, the duty of the circuit court is clear and the taking of further evidence would not be necessary.²⁸

These observations were based on the court's construction of section 18-9A-11, which it had relied on earlier to resolve peti-

²⁶ 261 S.E.2d 165, 171 (1979).

²⁷ *Id.* at 169.

²⁸ *Id.* at 173.

tioners' standing problems. However, the actual language of the statute provides, in pertinent part: "the county assessor and the county court, sitting as a board of equalization and review, shall use such appraised valuations *as a basis* for determining the true and actual value for assessment purposes"²⁹ This section related to the duties the statute imposes on those county officials. The *Tug Valley* court, however, imposes this standard on the circuit court sitting as a court, the court further ruled that, if an appraisal by the Tax Commissioner was available, "the taking of futher evidence would not be necessary."³⁰ The statute, however, continues: "The total assessed valuation . . . shall not be less than fifty percent nor more than one hundred percent of the appraised valuation"³¹ The court, in holding that the tax commissioner's figure was to be "the basis," rather than "a basis" thus denied the circuit court the discretionary range the statute allows to assessors. Certainly the commissioner's appraisal should be compelling evidence but, in the language of the statute, "evidence" is its only function. The Mingo County Circuit Court did in fact set the assessment at the tax commissioner's figure, but only after hearing testimony from the county assessor and the property owner, and after the tax commissioner's latest appraisal set the value at \$360.00 per acre.

III. THE AFTERMATH AND IMPLICATIONS OF *TUG VALLEY*

In analyzing the possible long-term effects of *Tug Valley*, the most significant aspect of the decision is the extent of the court's expansion of standing to review property assessments. The court's language, "every person affected by the tax base,"³² could conceivably allow bus passengers, inmates of the county jail, or any other person receiving county services to obtain review of *any* property tax assessment, with a statutory right to de novo appeal to the circuit court.³³ Clearly the holding seems salutary in its application to the situations presented by the petitioners, but precisely such an observation begs the question:

²⁹ W. VA. CODE § 18-9A-11 (1977 Replacement Vol.) (emphasis added).

³⁰ 261 S.E.2d at 173.

³¹ W. VA. CODE § 18-9A-11 (1977 Replacement Vol.).

³² 261 S.E.2d at 171.

³³ W. VA. CODE § 11-3-25 (1974 Replacement Vol.).

Would the court have been as willing to acknowledge the petitioners' interests if the case had not involved flood-ravaged Mingo County and Lincoln County with its "woeful" schools?³⁴ Or if there had been more than a single, or a few, large landholders involved?

The somewhat diverse occupations of the land, coal, and utility companies involved in *Tug Valley* notwithstanding, it seems the most frequent target of such suits would probably be the state's coal and coal-related concerns, many of whom are presently ill-equipped to bear any additional tax burdens. In relatively more optimistic times one author, foreseeing a bright future for the state's coal in the wake of the first OPEC oil embargo, nevertheless warned against taxing the industry too heavily:

[A]s of 1973, West Virginia was decidedly a high tax state [relative to surrounding coal-producing states] insofar as the bituminous coal industry was concerned. . . . If the output and profitability of this key industry rise as anticipated . . . pressures may quickly develop for further increases in the level at which coal is taxed in the State. The message of the present study is simply this: Let us proceed with caution; "King Coal" is already bearing a relatively heavy tax burden."³⁵

When that passage was written, property taxes accounted for just under ten percent of the total tax bill of an "average" West Virginia coal company, the remainder being largely attributable to state corporate income or business and occupation taxes.³⁶ Should, however, the "average" coal company's property tax assessments rise as much in two years as did the Mingo County property owner's (roughly 1000%), their disastrous effects would be plain. It is hoped that very few properties are as greatly underassessed as the mineral interests involved in *Tug Valley*, but even a smaller increase could be considered substantial. Moreover, in 1975 the legislature has imposed a new tax under the state's business and occupation tax on coal companies,

³⁴ Pauley v. Kelly, 255 S.E.2d 859, 899 (W. Va. 1979).

³⁵ Thompson, *State and Local Taxation of the Bituminous Coal Industry*, 76 W. VA. L. REV. 297, 321 (1974).

³⁶ *Id.* at 323.

with 75% of the proceeds to be refunded proportionately to the respective counties.³⁷

It seems, therefore, as if "pressures [have] quickly developed."³⁸ In *Tug Valley's* controversy, that being conflict between the majority, those consuming tax-funded services, and the minority, those funding the services, at least one thing seems clear: achieving "uniform and equal" taxation is a noble goal, but a difficult task.

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³⁷ W. VA. CODE § 11-13-21 (Cum. Supp. 1980). This section imposes an additional tax on the severance extraction and production of coal "equal to the value of the coal produced as shown by the gross proceeds derived from the sale thereof by the producer multiplied by thirty-five one hundredths of one percent, . . ." *Id.*

³⁸ Thompson, *supra* note 35, at 321.